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No. 07-981

Supreme Court, U.S.
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In The
Supreme Court of the United States

PAUL J. MEYERS, M.D.,
Petitioner,

v.

JOHN R. PARTRIDGE, M.D.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITIONER'S REPLY BRIEF

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I. MEYERS' FIRST IMPRESSION ARGUMENT IS PROPERLY BEFORE THIS COURT.[1]

Meyers raised the "first impression argument" before the Virginia Supreme Court, and Partridge did not object to his rasing it. Partridge merely disputed whether the question decided by the trial court in this case was one of first impression in Virginia.

> "In his Petition for Appeal, Meyers also claims that Partridge is not entitled to an award of attorneys fees because 'Partridge has prevailed on a case of first impression for this Court' (Pet. for Appeal at 31). This statement by Meyers is not supported by the record in this case. In his Memorandum in Support of Summary Judgment, Partridge cited the following two cases which were decided by the Circuit Court for the City of Newport News on similar issues before Partridge's motion for Summary

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[1] Because they are not germane to any question in the petition, Meyers had not addressed a number of incorrect, incomplete or misleading statements in Respondent's Statement of the Case. Suffice it to say that Meyers did not file three law suits against Partridge as he claims, Rep. at 7, ¶ 2, and the court did not dismiss the only other suit Meyers filed against Partridge for civil conspiracy and tortious interference with business expectancy on discovering that Partridge had changed his report at the behest of hospital administrators and lawyers. And this law suit was also not actively litigated for six years as claimed. Rep. at 19. Partridge essentially conducted no discovery himself, and expended considerable resources avoiding or obstructing Meyers' discovery. Petition for Appeal at 2.

> Judgment was heard, on of which is a decision from another case filed by Meyers" (citing to *Fuste v. Riverside Healthcare Ass'n, Inc.*, Law No. 29743-VC and *Meyers v. Riverside Hospital, Inc.*, Law No. 31394-EH).

Brief Opposing Petition for Appeal at 17-18. Partridge did not object to Meyers raising the "first impression argument" because it was before the trial court, and even if it was not, the trial court itself impliedly raised the issue.

Although Meyers did not make this argument to the trial court expressly, he raised it impliedly by arguing that no court besides the trial court in *Jenkins v. Methodist Hospital of Dallas*, No. 3:02-CV-1823-M, 2004 U.S. Dist. LEXIS 28094, at *48 (N.D. Tex. August 18, 2004) had ever held that persons who provide information to a professional review body are immunized by each of the two subsections of 42 U.S.C. § 11111(a), that no court had ever awarded attorney's fees in a case analogous to the present one, and that his interpretation of 42 U.S.C. § 1111(a) was not frivolous or unreasonable. *See* Brief Opposing Summary Judgment at 4-6; Brief Opposing Attorney's Fees at 3-4.

The trial court acknowledged that "there does not appear to be a Virginia decision directly on point", Pet. at 27a, ¶ 5, and relied on *Sugarbaker v. SSM Healthcare*, 187 F.3d 853, 857 (8th Cir. 1999) to justify its award of attorney's fees, *id.* at 11a, ¶ 4. In *Sugarbaker*, the Eighth Circuit denied attorneys fees under 42 U.S.C. § 11113, stating "at the time this suit was pending in the district court, no Eighth Circuit

precedent existed that addressed the standards for HCQIA immunity". *Sugarbaker*. 187 F.3d at 857-58. Therefore, the trial court also impliedly raised the first impression argument by its reliance on *Sugarbaker* and acknowledgment that this was a case of first impression in Virginia.

Partridge's contention that this is not a case of first impression in Virginia because the Circuit Court of Newport News decided similar questions in other cases before the court awarded attorney's fees in this case, Rep. at 22-23, is meritless. Even if these courts had decided the question of whether 42 U.S.C. § 11111(a)(1) immunizes persons who provided information to a professional review body, the holding of a trial court does not create legal precedent.

Therefore, the second question presented is properly before this Court, and a writ of certiorari should be granted on this question because the trial court decided it in a manner inconsistent with this Court's decision in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 423-24 (1978), and the Eighth Circuit's decision in *Sugarbaker*, 187 F.3d at 857-58.

II. THE TRIAL COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE.

Partridge's contention that there is nothing for this Court to "settle" because the trial court did not decide the first question presented in the Petition, Br. in Op

at 34, is meritless as are the reasons he advances for his position.[2]

Partridge moved for summary judgment, claiming he was immune because MIH was held immune for its actions, only after the defendants in *Fuste* and *Riverside* apprized Partridge of the court's decision in *Jenkins v. Methodist Hospital of Dallas*, No. 3:02-CV-1823-M, 2004 U.S. Dist. LEXIS 28094, at *48 (N.D. Tex. August 18, 2004). Brief Opposing Summary Judgment at 5.[3] The *Jerkins* court held that 42 U.S.C. § 11111(a) provides two independent grounds for immunity to persons who provide information to a professional review body, and that if the body is held immune for its actions, even persons who knowingly provide false information are immune under § 11111(a)(1)(D). *Jenkins* at *48.

Riverside relied on the holding and reasoning of *Jenkins* to move for reconsideration of the court's decision overruling its demurrer.

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[2] Partridge asserts that he "disputed, and continues to dispute" the allegations in his answer to the motion for judgment, Br. in Op. at 8-9; that even if the Court were to grant certiorari "whether the October 9, 2000 report allegedly contained false information would not be properly before the Court", *id.*; the trial court "did not make any findings regarding a person who knowingly provides false information to a professional review body", and concluded that whether § 11111(a)(2) would apply to Partridge was moot, *id.*

[3] The Virginia Supreme Court refused Meyers' petition in the MIH case on June 16, 2004.

> "The Defendants submit this *Motion for Reconsideration* because the Court failed to understand that HCQIA provides two separate and distinct opportunities for immunity to apply under the HCQIA. First, if a professional review action is reasonable, all persons who participate in or assist with the peer review activity are immune from damages. The falsity of any information does not defeat immunity..."

See Brief Opposing Summary Judgment at 4. Partridge moved for summary judgment on the same ground, and the question of whether § 11111(a)(1) as well as § 11111(a)(2) immunizes persons who provide information to a professional review body was before the court in this case. *See id.*; Pet. at 58a, ¶ 4.[4]

It is indisputable that Partridge provided information about Meyers' competence to MIH. The trial court overruled his demurrer on the ground that his report contained only opinions and no facts, Pet. at 44a, ¶ 3, and acknowledged that he was retained "in the attempt by Mary Immaculate Hospital to obtain all of the information" about Meyers' handling of the cases on which Riverside based its suspension, *id.* at 37a, ¶ 2. Meyers alleged that Partridge knowingly provided false information about him to MIH. Mot for J. and Fist Am. Mot. for J. The question before the court was whether this conduct is immunized by § 11111(a)(1) or § 11111(a)(2) or both, *id.* at 27a, ¶ 3. The trial court

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[4] Partridge attended oral arguments on Riverside's motion, and waited until the court ruled in Riverside's favor before moving for summary judgment himself.

said that it did not have to reach the question of whether Partridge had provided false information to MIH because he was immune for his conduct under § 11111(a)(1) given that MIH was immune, Pet. at 37a, ¶ 3 & 4, and whether Partridge was also immune under § 11111(a)(2) was moot for the same reason, *id.* at 34a, ¶ 2.

Thus, like the Jenkins court, the trial court in this case held that § 11111(a)(1)(D) immunizes a person who provides information to a professional review body, and reached its holding on the identical reasoning: to wit, that a person who provides information to a professional review body about the competence of a physician is *pari passu* assisting or participating with the body's actions. *Jenkins* at *48, Pet. at 34a, ¶ 2. Neither court premised or qualified its holding on the nature of the information provided.[5] Therefore, under the trial court's holding in this case, a person who knowingly provides false information to a professional review body will be immune under

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[5] Although the trial court embellished its holding by opining that no one was more deserving of HCQIA immunity than Partridge, and incorrectly described him as a "total stranger to this process", Pet. at 34a, ¶ 2, this puffery is *dictum*. Partridge saw one of Meyers' patients in consultation after Meyers' privileges were suspended, and had also acted as an expert witness for the hospital's attorney in medical malpractice cases. More generally, Partridge is a professional expert witness who ears a significant income form testifying in court. Therefore, the implication of the court's stranger argument - that Partridge had no incentive to make false statements about Meyers - is untrue.

§ 11111(a)(1)(D) if the body is held immune for its actions.[6]

This holding is not affected by Partridge denials in his answer to the motion for judgment or by the fact that Partridge did not pierce the pleadings and place the sufficiency of Meyers' evidence proving that Partridge knowingly provided false information to MIH before the court. This result is absurd even if it can be reached on a literal interpretation of § 11111(a) because no colorable argument can be made that immunizing persons who knowingly provide false information to a professional review body will encourage physicians to engage in effective peer review - the expressly stated purpose of HCQIA, *see* 42 U.S.C. § 11101(5) - as opposed to encourage abuses of peer review. It is evident that the Virginia Supreme Court has approved this interpretation, will apply it in future cases, and having denied petition for appeal in four cases of first impression involving HCQIA, it is unlikely to grant a petition to explain its reasoning. For all these reasons, this Court should decide the question presented.

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[6] The court also held that Partridge was immune under § 11111(a)(1)(C) as a person who had a contract or formal agreement with the body. Pet. at 37a, ¶ 3.

A. There are compelling reasons for this Court to decide whether 42 U.S.C. § 11111(a)(1) immunizes persons who knowingly provide false information to a professional review body about the competence of a physician.

The quality of health care and its oversight are of compelling interest to society. Immunities, like privileges, create incentives. If immunity is provided to those who abuse peer review - the process by which the quality of care is overseen - incentives will be created to use peer review not to improve the quality of health care but to further a variety of interests that do not benefit but harms the public interest.

Abuse of the peer review process does more than impose financial costs on its victims. Having one's clinical privileges suspended or revoked is not analogous to being laid off or even fired from a job. Such actions destroy professional careers that have taken years of training and experience to build, and ruin the lives of the physicians involved and their families to an extent that is difficult to overstate. Since powerful incentives to abuse the peer review process exist in the modern health care environment and it is impossible to practice medicine without having adverse outcomes, the opportunities and pretexts to abuse the peer review process are almost limitless.[7]

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[7] For example, hospitals have financial incentives to remove physicians from their medical staffs who lose money for the hospital because they treat indigent patients with no or limited insurance, especially if they provide the same state of the art, and

To suggest that Congress intended the immunity provisions of HCQIA to immunize persons who knowingly provide false information to a professional review body and struck a balance that would result in such injustices to members of the medical profession, Rep. at 35-36, defies common sense, and the legislative history of HCQIA. Physicians who deliberately make false statements about operating times and blood and change their reports to make them more disparaging of their colleagues, as Partridge did, First. Am. Mot. for J., are not protected by HCQIA. Similar conduct by the defendants in *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986), the case that led to the introduction of the Bill that became HCQIA, was described by the Ninth Circuit as "shabby, unprincipled and unprofessional", *Patrick v. Burget*, 800 F.2d 1498, 1507(9th Cir. 1986), and the cosponsors of the Bill acknowledged that the "bad faith peer review activities permitted by the *Patrick* case would never obtain immunity under H.R. 5540", *see* 132 Cong. Rec. H11590 (daily ed. Oct 17, 1986) (statements of Rep. Waxman). In the case Partridge cites for the opposite proposition, the standard for immunity under HCQIA applied was not the objective reasonableness standard Congress enacted, *see* 42 U.S.C. § 11112(a); *Singh v. Blue*

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often more costly, treatments to them as they offer more affluent patients. Hospitals have incentives to remove physicians who do not use the hospital's support services because better or less costly services are available elsewhere, or who compete with services the hospital also provides. Physicians in different specialties from physician under review may have incentives as well as direct competitors to take unwarranted peer review actions if the targeted physician requests fewer consultations and/or orders fewer expensive or invasive tests than they expect.

Cross / Blue Shield of Massachusetts, Inc., 308 F.3d 25, 32 (1st Cir. 2002), but a minimal relations test the court described as follows:

> Basically, as long as the hospitals provide procedural due process and state some minimal basis related to quality health care, whether legitimate or not, they are immune from liability. Unfortunately, this may leave the hospitals and review board members free to abuse the process for their own purposes without regard to quality medical care.

Meyer, 22 P.3d at 1153-54. Moreover, in recognition of the fact that "professional review actions brought for illegitimate reasons may not appear as such on their face",[8] a further subsection was added to the list of exclusions in § 11151(9) after hearings before the House Subcommittee on Civil and Constitutional Rights "to clarify that the list of exclusions [was] not exhaustive"[9] and "to avoid the inference that any matters not listed in this subsection [42 U.S.C. § 11151(9)] are necessarily ones related to competence

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[8] *See* 132 Cong. Rec. H9959 (daily ed. Oct. 14, 1986) (statements of Rep. Waxman describing Amendment No. 10).

[9] *See* 132 Cong. Rec. H11591 (daily ed. Oct. 17, 1986) ("a catch-all provision clarifying that the exceptions to considerations of competence or professional conduct set forth in [42 U.S.C. § 11151(9)] are illustrative, not exhaustive. We agree and have included language to this effect.") (Statements of Rep. Waxman).

or professional conduct".[10] The Nevada Supreme Court is, therefore, not correct that immunity under HCQIA reaches pretextual actions.[11]

Partridge is also not correct that Meyers is asking this Court to reform HCQIA and limit the scope of its immunity. Meyers is asking the Court to ensure that courts apply the immunity provisions and standards Congress enacted and not a chimera that is half statute, half judge made law.

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[10] *See* 132 Cong. Rec. H9959 (daily ed. Oct. 14, 1986) (statements of Rep. Waxman describing Amendment No. 10).

[11] Justice Shearing and the Nevada Supreme Court seems to have had doubts about the correctness of the decision in *Meyer* (in which revocation of privileges was based on one case) because just one month later, the court, in an opinion written by Justice Shearing, held that "One instance of an objective basis for discipline does not per se permit a hospital to claim immunity under § 11112(a)(1)". *See Clark v. Columbia / HCA Info. Serv. Inc.*, 25 P.3d 215, 223 (Nev. 2001).

CONCLUSION

The writ of certiorari should, respectfully, be granted.

Respectfully submitted

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